SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FIRST MERCURY INSURANCE COMPANY, acting through its agent, RIVERSTONE CLAIMS MANAGEMENT, LLC, Plaintiff, - against - D'AMATO & LYNCH, LLP, LUKE LYNCH JR., ESQ., ARTURO BOUNTIN, ESQ., MICHAEL HAIG, DAVID BOYAR, ROBERT LANG, John Does 1-20, and Jane Does 1-10, Defendants.	Index No.: 159185/2019 Motion Seq. No. 006

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY DEFENDANTS D'AMATO & LYNCH, LLP AND LUKE D. LYNCH, JR. TO COMPEL ALTERNATIVE DISPUTE RESOLUTION

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Defendants D'Amato & Lynch, LLP ("D&L") and Luke D. Lynch, Jr. ("Mr. Lynch"), by their undersigned counsel, respectfully submit this memorandum of law in support of their motion, pursuant to Article 75 of the CPLR, to stay this action as against them and compel alternative dispute resolution. Copies of the Verified Complaint (the "Complaint") and the Engagement Agreement that contains the multi-tiered dispute resolution clause that requires the claims asserted by Plaintiff in this action to be arbitrated if they cannot be successfully negotiated or mediated are attached as Exhibits A and B, respectively, to the accompanying Affidavit of Luke D. Lynch, Jr., sworn to on November 12, 2019 (the "Lynch Aff.").

PRELIMINARY STATEMENT

In this action, Plaintiff seeks to recover damages from D&L and Mr. Lynch (and others) in connection with D&L's engagement as national coordinating counsel to represent policyholders in personal injury and other actions within the United States. In the Complaint, Plaintiff asserts seven causes of action against D&L, Mr. Lynch and three of his former partners, D&L's comptroller, and unknown parties designated as "John Does 1-20" and "Jane Does 1-10", all premised on allegations that the defendants mishandled monies purportedly intended to be used for settlement of a claim against a policyholder.

The terms of D&L's engagement as national coordinating counsel are set forth in a written Engagement Agreement. Among other things, the Engagement Agreement contains a broad, multi-tiered dispute resolution clause. Plaintiff's decision to sue D&L, Mr. Lynch, three of his former partners and D&L's comptroller in this forum ignores the dispute resolution clause set forth in the Engagement Agreement, which mandates that any disputes that the parties cannot resolve by negotiation or mediation be submitted for final binding arbitration conducted in accordance with the Commercial Rules of the American Arbitration Association ("AAA").

As demonstrated below, this action should be stayed as against D&L and Mr. Lynch, and Plaintiff should be compelled to abide by the dispute resolution clause in the Engagement Agreement and arbitrate its claims against them to the extent the claims cannot be resolved by negotiation or mediation.

STATEMENT OF FACTS

A. Background

D&L is a law firm located in Manhattan which was founded in 1969. D&L has been a registered New York limited liability partnership since 2007, and historically its business has been primarily devoted to the practice of insurance law and corporate defense litigation. Mr. Lynch has been a partner of D&L since 1983. (Lynch Aff. ¶ 1.)

In August 2017, Plaintiff retained D&L as national coordinating counsel to represent insurance policyholders as their attorneys in personal injury and other actions within the United States. The terms of D&L's engagement as national coordinating counsel are set forth in a written Engagement Agreement, a copy of which is attached as Exhibit B to the accompanying Lynch Affirmation. Among other things, the Engagement Agreement contains a broad, multi-tiered dispute resolution clause, which provides for arbitration of any disputes relating to the agreement that cannot be resolved by negotiation or mediation. The dispute resolution clause, Section VII.F of the Engagement Agreement, is quoted in full in the Argument section of this memorandum of law at pp. 4-5, *infra.*

B. The Complaint

In the Complaint, Plaintiff seeks to recover for damages allegedly sustained as a result of defendants' alleged mishandling of a $1 million check allegedly intended to be used for the settlement of a claim against a policyholder in an action entitled *Cox v. Linco Restoration Corp.*,

et al., in which the policyholder was represented by D&L pursuant to the Engagement Agreement. (*See* Complaint ¶¶ 18-21, 26, 37.)

The Complaint asserts seven causes of action against D&L, Mr. Lynch and other individuals associated with D&L, all premised on the alleged mishandling of the $1 million check. The Complaint labels the causes of action as claims for Negligence (First Cause, ¶¶ 44-70), Breach of Fiduciary Duty (Second Cause, ¶¶ 71-84), Conversion (Third Cause, ¶¶ 85-93), Violation of the Rules of Professional Responsibility (Fourth Cause, ¶¶ 94-104), Violation of Judiciary Law § 487 (Fifth Cause, ¶¶ 105-109), Violation of the New York Debtor and Creditor Law (Sixth Cause, ¶¶ 110-116) and Unjust Enrichment (Seventh Cause, ¶¶ 117-124). In the Wherefore clause, Plaintiff demands judgment for compensatory damages in an amount to be determined at trial for the alleged mishandling of the $1 million check and, in addition, disgorgement of previously paid legal fees, treble damages under Judiciary Law § 487, punitive damages, and attorney fees and costs. (*See* Complaint, Wherefore Clause.)

The Complaint also sets out a series of allegations as to why, in Plaintiff's view, this dispute should not be subject to the multi-tiered dispute resolution provision in Section VII.F of the Engagement Agreement. (*See* Complaint ¶¶ 29-35.) These allegations are addressed in the Argument section of this memorandum of law at pp. 11-12, *infra*.

ARGUMENT

THIS DISPUTE IS SUBJECT TO THE DISPUTE RESOLUTION CLAUSE SET FORTH IN SECTION VII.F OF THE ENGAGEMENT AGREEMENT

The Engagement Agreement contains a broad dispute resolution clause, which clearly and unmistakably evidences the parties' intent that an arbitrator rather than a court will resolve any dispute relating to the agreement that cannot be resolved by negotiation or mediation, including any dispute as to whether a particular claim is within the scope of the dispute resolution clause. Given the breadth of the dispute resolution clause, and its express incorporation of the Commercial Rules of the AAA, this Court should compel Plaintiff to abide by the dispute resolution clause and, in the event this matter cannot be resolved by negotiation or mediation, permit an arbitrator to decide the threshold arbitrability question presented in this case -- namely, whether Plaintiff's claims are within the scope of the dispute resolution clause. In the alternative, should this Court choose to address the threshold arbitrability question, consistent with the strong national policy of encouraging arbitration, this Court should hold that Plaintiff's claims against D&L and Mr. Lynch are arbitrable and stay this action as against them.

A. Section VII.F of the Engagement Agreement Mandates that the Threshold Question of Arbitrability Be Decided by An Arbitrator

Section VII.F of the Engagement Agreement provides:

> This Engagement Agreement is governed by and is to be construed in accordance with the laws of California without regard to its conflict of laws doctrines. If *any dispute* arises between Riverstone and NCC [*i.e.*, D&L] *with respect to this Engagement Agreement* which the parties are unable to resolve by negotiation within fifteen (15) days of written notice by any party to the others, the parties agree that the dispute will be submitted to mediation in California before a professional mediator. If the dispute is not resolved within thirty (30) days after submission to mediation, any party may submit the matter for final binding resolution by arbitration. *The arbitration shall be confidential and shall be conducted in*

> *accordance with the then effective Commercial Rules of the American Arbitration Association.* Any decision by the Arbitrator is binding and can be entered into any court having jurisdiction. The arbitrator has no authority to amend this Engagement Agreement.

Engagement Agreement, Section VII.F, at pp. 13-14 (emphasis added) (Lynch Aff., Ex. B).

Arbitration is a matter of contract, and courts therefore must "ensure that commercial arbitration agreements, like other contracts, '"are enforced according to their terms'", and according to the intentions of the parties." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (citations omitted). Just as parties may agree to arbitrate the merits of their disputes, parties also may agree to arbitrate threshold arbitrability questions, such as whether a particular dispute is within the scope of an arbitration provision, by delegating arbitrability questions to the arbitrator to decide rather than the court. If there is "clear and unmistakable" evidence, *First Options*, 514 U.S. at 944 (alterations omitted); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010), that the parties delegated the particular threshold arbitrability question at issue to the arbitrator, a court should grant a motion to compel arbitration without addressing the threshold question. *See Rent-A-Center,* 561 U.S. at 71, 72-76 (reversing denial of motion to compel, where delegation provision in arbitration agreement gave the arbitrator "'exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement", and respondent sought to challenge the enforceability of the agreement as a whole on grounds of unconscionability, a matter solely within the purview of the arbitrator under the agreement) (ellipses in original).

A contract need not set out a detailed statement of the matters delegated to the arbitrator to meet the "clear and unmistakable" evidence standard. Here, the parties delegated the threshold arbitrability question at issue -- whether the parties' agreement covers a particular dispute -- to the arbitrator by expressly incorporating the Commercial Rules of the AAA into Section VII.F of the Engagement Agreement. Rule 7(a) of the Commercial Rules of the AAA provides as follows:

"The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, R-7(a) (2013) (Lynch Aff., Ex. C). Courts consistently find that express adoption of AAA rules (or rules of other arbitral institutions with rules analogous to Rule 7(a)) presents "clear and unmistakable" evidence that the parties agreed to delegate questions of arbitrability to the arbitrator. *See, e.g., Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) ("[W]e conclude that the arbitration provision's incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator."); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (same); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332–33 (11th Cir. 2005) (same); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (same). *See also Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074-75 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. . . . [A]s long as an arbitration agreement is between sophisticated parties to commercial contracts, those parties shall be expected to understand that incorporation of [analogous United Nations Commission on International Trade (UNCITRAL)] rules delegates questions of arbitrability to the arbitrator."); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (same result under analogous International Chamber of Commerce (ICC) Rules). *But see Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998).

The dispute resolution provision in Section VII.F establishes the parties' intent to arbitrate "*any dispute . . . with respect to the Engagement Agreement*" that cannot be resolved by negotiation

or mediation. As discussed in Point B below, the phrase "with respect to" in a contract is construed broadly, and thus necessarily includes any "dispute" regarding the scope of the dispute resolution clause. The breadth of the dispute resolution provision, together with the express incorporation of the AAA rules in Section VII.F, clearly and unmistakably demonstrates the parties' intent to arbitrate threshold arbitrability questions. This Court therefore should compel Plaintiff to abide by the dispute resolution clause in the Engagement Agreement so that a AAA arbitrator can, as an initial matter, resolve whether the claims asserted against D&L and Mr. Lynch in the Complaint are within the scope of Section VII.F.

B. If This Court Elects to Decide the Issue of Arbitrability, It Should Compel Plaintiff to Abide by the Dispute Resolution Clause and Arbitrate Its Claims Against D&L and Mr. Lynch If This Matter Cannot Be Resolved By Negotiation or Mediation

As shown in Point A above, this Court need not reach the question of whether Plaintiff's claims are arbitrable because the power to decide the threshold question of whether a particular claim is within the scope of the dispute resolution clause has been delegated to the arbitrator by the express incorporation of the Commercial Rules of the AAA into Section VII.F of the Engagement Agreement. However, if this Court chooses to decide the threshold issue of arbitrability, Plaintiff should be compelled to abide by the dispute resolution clause in the Engagement Agreement, and this action should be stayed as against D&L and Mr. Lynch, because Plaintiff's claims fall squarely within the scope of the dispute resolution clause. The merits of those claims therefore must be decided by an arbitrator if the claims cannot be resolved by negotiation or mediation.

1. Any Doubts Concerning the Scope of Arbitrable Issues Must Be Resolved in Favor of Arbitration

The Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA"), which is applicable where, as here, an arbitration provision is contained in a contract involving or affecting interstate

commerce, "establishes an 'emphatic' national policy favoring arbitration which is binding on all courts, State and Federal." *Singer v. Jefferies & Co.*, 78 N.Y.2d 76, 81 (1991) (citations omitted); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Under the FAA, "'questions of arbitrability must be addressed with a healthy regard for the federal policy . . . [and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Singer*, 78 N.Y.2d at 81-82 (quoting *Moses H. Cone Mem. Hosp.*, 460 U.S. 1, 24-25 (1983) (ellipsis and alteration in original)). Both New York law and California law are substantially the same as federal law in this regard. *See, e.g., Matter of Exercycle Corp. (Maratta),* 9 N.Y.2d 329, 334, (1961) ("It has long been this State's policy that, where parties enter into an agreement and, in one of its provisions, promise that any dispute arising out of or in connection with it shall be settled by arbitration, any controversy which arises between them and is within the compass of the provision must go to arbitration"); *Howard v. Goldbloom*, 30 Cal. App. 5th 659, 663, 241 Cal. Rptr. 3d 743, 746 (Cal. Ct. App. 2018) ("California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration.") (citations and internal quotations omitted).

Courts should "'construe arbitration clauses as broadly as possible'" and should compel arbitration "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 19 (1995) (citations omitted). "[A] court should decide at the outset whether 'the arbitration agreement [is] broad or narrow.' If broad, then there is a presumption that the claims are arbitrable." *Id.* at 20 (citations omitted; alteration in original). Moreover:

> In determining whether a particular claim falls within the scope of the parties' arbitration agreement, [a court should] focus on the allegations in the complaint rather than the legal causes of action asserted. *If the allegations underlying the claims 'touch matters'*

> *covered by the parties' agreements*, then those claims must be arbitrated, whatever the legal labels attached to them.
>
> . . . If a court concludes that [an arbitration] clause is a broad one, then it will order arbitration and any subsequent construction *of the contract and of the parties' rights and obligations under it* are within the jurisdiction of the arbitrator.

Id. at 20-21 (citations and internal quotations omitted; emphases in original).

2. The Dispute Resolution Clause Is Broad, Justifying a Presumption That Plaintiff's Claims Are Arbitrable

Here, the dispute resolution clause is broad, providing for negotiation, followed by mediation, and concluding with arbitration of "*any dispute . . . with respect to the Engagement Agreement*", with no expressed limitations or exclusions. *See* Engagement Agreement, Section VII.F. The phrase "with respect to" in a contract is construed broadly, and is synonymous with phrases such as "related to," "relating to," "in relation to," "in connection with," "associated with," and "with reference to," *see Coregis Ins. Co. v. American Health Found., Inc.*, 241 F.3d 123, 128-29 (2d Cir. 2001) (Sotomayor, J.), all phrases which are "broader in scope than the term "arising out of," *id.* at 129, and which mean "connected by reason of an established or discoverable relation," *id.* at 128. *Cf. Lamar, Archer, & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018) ("Use of the word 'respecting' in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject.").

Thus, in *Collins & Aikman*, the Court described a clause that submitted to arbitration "any claim or controversy arising out of or relating to" the contract as the "paradigm of a broad [arbitration] clause," 58 F.3d at 20, because inclusion of a phrase such as "relating to," related to," "in relation to," "in connection with," or "with respect to" in an arbitration clause means that the clause is not limited to claims for breach of contract but also encompasses claims that '"touch matters' covered by" the contract. *See id.* at 21 (citation omitted). *See also Mehler v. Terminix*

Intern. Co. L.P., 205 F.3d 44, 50 (2d Cir. 2000) (holding that a classically broad arbitration clause, providing for arbitration of "any controversy or claim between [the parties] arising out of or relating to" a contract is entitled to a presumption of arbitrability and that "the issue sought to be arbitrated need not constitute a breach of the contract containing the arbitration clause . . . . the relevant question is whether the dispute '*arises out of*' or '*relates to*' that contract.") (alteration and emphasis in original).

Because the dispute resolution clause in Section VII.F of the Engagement Agreement applies to any dispute that relates to the Engagement Agreement, it is a classically broad clause that "'justifies a presumption of arbitrability.'" *Mehler*, 205 F.3. at 49 (citation omitted); *see also Collins & Aikman*, 58 F.3d at 20. Therefore, as the court in *Collins & Aikman* explains, the next step in the arbitrability analysis is to determine whether the seven causes of action asserted in the Complaint fall within the scope of this broad clause, by ignoring the seven different legal labels attached to them, and focusing on the factual allegations. *See* 58 F.3d at 20-21. Review of the allegations set forth in the seven causes of action reveals that each seeks to recover for damages allegedly sustained as a result of defendants' alleged mishandling of a $1 million check allegedly intended to be used for settlement of a claim against a policyholder in an action entitled *Cox v. Linco Restoration Corp., et al.*, in which the policyholder was represented by D&L pursuant to the Engagement Agreement. Plaintiff's claims thus all "'touch matters' covered by" the Engagement Agreement, *Collins & Aikman*, 58 F.3d at 21, and must be arbitrated under the dispute resolution clause in Section VII.F of the agreement if this matter cannot be resolved by negotiation or mediation.

3. Section VII.F Applies to All Disputes Relating to the Engagement Agreement. There Are No Exceptions or Exclusions.

In the Complaint, Plaintiff seeks to obfuscate this straightforward analysis by alleging that this dispute concerns an Extra-Contractual Obligation ("ECO") or Loss in Excess of Policy Limits ("XPL"), as defined in Section V.G(3) of the Engagement Agreement (*see* Complaint ¶ 29), and further alleging that such a "dispute is not subject to mediation, arbitration or alternative dispute resolution pursuant to [S]ection VII.F" of the Engagement Agreement (Complaint ¶ 35). Putting aside the substantive point that ECO and XPL are reinsurance terms concerning an insurance carrier's liability to a policyholder for negligence or other misconduct in connection with handling the policyholder's claim and have nothing whatsoever to do with the present dispute,[1] Section V.G(3) of the Engagement Agreement actually provides that:

> [T]he economic consequence to any third party for such ECO or XPL are to hereby be allocated between [Carrier and D&L] based upon whose actions are determined to be primarily responsible for giving rise to such obligation. ***Any dispute over such determination shall be resolved under Section VII.F below*** [*i.e.*, the very dispute resolution clause at issue on this motion].

Engagement Agreement, Section V.G(3), at p. 11 (emphasis supplied) (Lynch Aff., Ex. B).

Plaintiff cannot unilaterally decide to bypass the dispute resolution process, unilaterally declare D&L liable, and then move on to post-ADR enforcement remedies (*see* Complaint ¶¶ 30-34 (discussing post-ADR enforcement remedies in Section V.G(3))). Nor may Plaintiff ask this Court to consider or rule on the potential merits of the parties' claims and defenses in connection with this motion. *See AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 650 (1986) (A court has "'no business weighing the merits of the grievance'" because the "'agreement is to submit all

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[1] *See* Reinsurance Association of America, *Fundamentals of Property and Casualty Reinsurance With Glossary of Reinsurance Terms* 42, 52 (2016) (definitions of Extra-Contractual Obligation (ECO) and Loss in Excess of Policy Limits (XPL)).

grievances to arbitration, not merely those which the court will deem meritorious.'") (citation omitted).

In sum, Section VII.F is a broad dispute resolution clause, with no exceptions or exclusions, and Plaintiff's claims fall squarely within its scope. Therefore, this Court should stay this action as against D&L and Mr. Lynch, and Plaintiff should be compelled to abide by the dispute resolution clause in the Engagement Agreement and arbitrate its claims against them to the extent the claims cannot be resolved by negotiation or mediation. *See Collins & Aikman*, 58 F.3d at 20-21; *Mehler*, 205 F.3d at 49.

C. Mr. Lynch Is Entitled to Invoke the Dispute Resolution Clause

Courts consistently hold that employees or other agents of an entity that is a party to an arbitration agreement are "protected" by the agreement in the sense they may invoke the agreement to compel arbitration if they are sued for alleged acts carried out in connection with their employment or agency or by reason of their status as an employee or agent of the principal, provided the claims against them fall within the scope of the arbitration agreement. *See Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993) (collecting cases); *see also* 1 *Domke on Commercial Arbitration* § 13.4 (3d ed. 2019) ("To the extent that a suit alleges misconduct that relates to behavior as officers or directors or in their capacities as agents of the corporation, the courts have consistently afforded agents the benefit of arbitration agreements entered into by their principals.").

The Complaint asserts the same seven causes of action against Mr. Lynch as against D&L, and asserts them against Mr. Lynch by reason of his status as a partner of D&L and/or his alleged actions as a partner of D&L. Mr. Lynch therefore is equally entitled as D&L to have the claims against him heard in arbitration rather than in a court.

CONCLUSION

For the foregoing reasons, Defendants D'Amato & Lynch, LLP and Luke D. Lynch, Jr. respectfully request that this Court grant their motion for an order staying this action as against them, and compelling Plaintiff to arbitrate the claims asserted against them in accordance with the dispute resolution provisions in Section VII.F of the Engagement Agreement if those claims cannot be successfully negotiated or mediated, and grant them such other and further relief as this Court deems just and proper.

Dated: November 12, 2019
New York, New York

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